UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 13

MAGNUM TRANSPORTATION INC.,	)	
	)	
Employer,	)	
	)	
And	)	
	)	
EXCAVATING, GRADING, ASPHALT, PRIVATE SCAVENGERS and RECYCLERS, AUTOMOBILE SALESROOM GARAGE ATTENDANTS, LINEN and LAUNDRY and MACHINERY, SCRAP IRON, STEEL and METAL TRADE CHAUFFEURS, HANDLERS, HELPERS and ALLOY FABRICATORS, TEAMSTERS LOCAL UNION NO. 731	)	Case No. 13-RC-113924
	)	
Petitioner.	)	

BRIEF OF THE EMPLOYER IN SUPPORT OF ITS EXCEPTIONS TO THE HEARING OFFICER'S REPORT ON CHALLENGE AND OBJECTIONS

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I. STATEMENT OF THE CASE

On November 8, 2013, an election was held in Case No. 13-RC-113924, in which of a unit of 15 eligible voters 7 ballots were cast for the Petitioner, Excavating, Grading, Asphalt, Private Scavengers and Recyclers, Automobile Salesroom Garage Attendants, Linen and Laundry and Machinery, Scrap Iron, Steel and Metal Trade Chauffeurs, Handlers and Helpers and Alloy Fabricators, Teamsters Local Union No. 731 (hereinafter "the Union"), 6 votes were cast against the Petitioner, 1 ballot was "void" and another ballot was challenged.[1] Thereafter, on November 15, 2013, the Employer, Magnum Transportation Inc., filed its Objections to the conduct of the election and to conduct affecting the results of the election. Those Objections

[1] Regional Director's Report on Challenge and Objections and Notice of Hearing, dated December 6, 2013 at p. 1, fn. 1 (hereinafter referred to as "Report, p. __").

dealt with three issues involving alleged conduct affecting the outcome of the election allegedly engaged in by the Petitioner and/or its agents, as well as an issue concerning the conduct of the election and the treatment of the one challenged ballot. Following the issuance by Regional Director Peter Sung Ohr of his Report on Challenges and Objections on December 6, 2013, which directed that a hearing be conducted in this matter to resolve "substantial and material credibility issues raised in the investigation," a hearing was convened on January 9, 2014 before Hearing Officer Adriana Kelly at which all parties submitted testimonial and documentary evidence. Thereafter, on February 6, 2014, the Hearing Officer issued her Report on Challenge and Objections, recommending that the challenge to the single challenged ballot be sustained, that the Employer's Objections be overruled in their entirety, and that a Certification of Representative be issued. (Hearing Off. Report, p. 7).[2]

On February 20, 2014, the Employer, Magnum Transportation, Inc., filed Exceptions to the Hearing Officer's Report in support of its Objections and its position concerning the opening of the challenged ballot as well as to the conduct of the election.[3] The following is the Employer's brief in support of those Exceptions. For all of the reasons set forth herein, the Employer submits that the challenge to employee Anthony Inendino's vote be overruled and his vote counted, or alternatively in the event the challenge to the ballot is sustained, that

[2] References "Hearing Off. Report, p. __" are to the pages of the Hearing Officer's Report on Challenge and Objections, dated February 6, 2014.

[3] As set forth more fully in the Hearing Officer's Report, the Employer initially filed five Objections, one of which dealt with the conduct of the election, three of which dealt with conduct affecting the election allegedly engaged in by Petitioner and/or its agents, and a fifth "catch all" Objection. At the hearing, the Employer withdrew Objection No. 3, dealing with alleged threats made to a voter concerning his existing pension with another Union. Further, the Employer has not raised any Exceptions concerning the Hearing Officer's recommendations concerning Objections No. 2, 4 and 5, and instead is raising Exceptions only concerning the Hearing Officer's recommendations to sustain the challenge to the single challenged ballot, and to overrule Objection No. 1 concerning the conduct of the election.

Employer's Objection No. 1 be upheld and the election be set aside due to the conduct of the election which caused the voter to be confused as to the proper voting procedures.

II. STATEMENT OF THE EVIDENCE PRESENTED AT THE HEARING

A. The Parties

Magnum Transportation, Inc., (hereinafter referred to as "Magnum" or the "Employer"), the Employer in this case, is engaged in the dump truck business in the Chicagoland area, where it has been operating for the past eight and one-half years. (Tr. 13-14).[4] Magnum hauls sand, gravel, stones, dirt and other material to public and private jobsites using its fleet of Mack trucks with 22 foot trailers. (Tr. 14). It currently has 17 drivers and two office personnel. (Id.). It is an "employer" within the meaning of Section 2(2) of the National Labor Relations Act, (the "Act"), 29 U.S.C. §152(2).

Excavating, Grading, Asphalt, Private Scavengers and Recyclers, Automobile Salesroom Garage Attendants, Linen and Laundry and Machinery, Scrap Iron, Steel and Metal Trade Chauffeurs, Handlers and Helpers and Alloy Fabricators, Teamsters Local Union No. 731 (hereinafter "the Union"), is a "labor organization" within the meaning of Section 2(5) of the National Labor Relations Act, (the "Act"), 29 U.S.C. §152(5), and is the Petitioner in Case No. 13-RC-113924.

B. The Events Occurring at the November 8, 2013 Election

On November 8, 2013, pursuant to a Stipulated Election Agreement between the parties, Region 13 of the National Labor Relations Board conducted an election among a proposed bargaining unit of "all full-time and regular part time drivers engaged in grinding, asphalt

[4] References hereinafter to "Tr. __" are to the pages of the transcript of the January 9, 2014 hearing; references "Bd. Ex __" are to Board Exhibits; references "Er. Ex. __" are to Employer Exhibits; references "U. Ex. __" are to Union Exhibits.

excavating, and contaminated soil removal, employed by the Employer at its facility located at 3619 S. Normal Avenue, Chicago Illinois." (Board Ex. 1(b), p. 1 & n. 2 and 3). As noted above, the eligible voting unit consisted of 15 persons, 14 of which actually cast ballots. (Tr. 17, 90; U. Ex. 4; Board Ex. 1(b), p. 1 & n. 1). Witness Sam Geraci, a Magnum driver and the Employer's Observer during the voting, testified at the hearing that the election was under the supervision of Tim Koch, an attorney with NLRB Region 13, and that the Union's Observer was Angelo Ouellette, another Magnum driver. (Tr. 17-18). Geraci described the procedure under which voters cast their ballots on that day. As he explained, the voter would come into the voting area, state his name, and he and Ouellette would place a check next to the voter's name on the voting list. (Tr. 18-19). Then, Mr. Koch would give the voter a ballot, the voter would go into the voting area in an adjacent room, mark his ballot, and then put the ballot into the ballot box on the table. (Tr. 19). Geraci testified that the ballots were folded by Koch prior to the time at which Koch handed them to the voters, and that Koch, while handing the ballot to the voter, told the voter to "take the ballot, mark an 'X' on the ballot, and return it to the ballot box." (Tr. 20, 26-27).

During the polling period, Magnum driver Anthony Inendino came in to vote. (Tr. 19). Geraci testified that Inendino came into the room, had his name checked off the Excelsior list, received a folded ballot from Koch, who told him to mark an "X" on the ballot and return it to the ballot box. (Tr. 19-20). Inendino proceeded to do just what Koch told him to do: he went into voting booth, marked an "X" on the ballot, came out, put the ballot into the box, and then left the area. (Tr. 20-21). A few minutes later while the polls were still open, Inendino returned to the voting area and asked to use the bathroom, which was attached to the voting area. (Tr. 21).

He was told that he could not do that while the polls were open.[5] A few minutes later, again while the polls were still open, Inendino came back to the voting area and told Koch that "he only put an 'X' on the folded ballot because nobody told him to open the ballot up and read the inside of the ballot." (Tr. 22). Koch asked Inendino what he meant, and Inendino stated to Koch that "you (referring to Koch) did not tell me to open the ballot and read the inside of the ballot, you just told me to mark an X on it and that's what I did." (Id.). Koch responded that "well, maybe my instructions were kind of vague, I should have told you to open a ballot up and look at the ballot on the inside." (Id.). Geraci stated that he, Angelo and Koch were "dumbfounded" by the situation, and Koch told them that "this has never happened before." (Id.). Inendino then asked Koch if Koch could open up the ballot box, retrieve the incorrect ballot, and allow him to cast a proper ballot, whereupon Koch told Inendino that "no, we could not do that." (Tr. 23). Koch then said he would have to talk the matter over with Geraci and Ouellette, and that "we all had to agree on what action would be taken because he (Koch) did not know how to handle it because it's never happened before." (Id.). Koch then stated that if both observers agreed, he would allow Inendino to cast another ballot, put the new ballot in a challenged ballot envelope, and put that off to the side. (Tr. 23-24). All present agreed to that course of action, and Inendino received a new ballot from Koch, marked it in the voting booth, and came out and gave it to Koch, who placed it into a challenged ballot envelope. (Tr. 24). After the polls closed, Geraci testified that Koch opened the box, poured the ballots onto the table, pulled out the folded ballot with the "X" on the outside just as Inendino had described it, and put it off to the side. (Tr. 24-25).

[5] Inendino and Angelo Ouellette testified that Inendino came back once to use the bathroom, while Geraci testified that Inendino returned twice. (Tr. 21-22, 28, 39, 102).

Inendino, a three year Magnum driver, testified much the same as Geraci. As Geraci described, Inendino stated that he came into the voting area and saw Geraci, Ouellette and a tall man with glasses "from the federal government" who he recalled as being Tim Koch. (Tr. 37). After his name was checked off the voting list, Inendino was handed by Koch a folded piece of paper who told him to "go back [into the voting booth] and put an X on this piece of paper." (Tr. 38, 44, 47-48). Inendino further testified that when he got to the voting booth and saw the folded blank piece of paper with no "yes or no category on it" he said to Koch, "sir, where am I supposed to be putting this X," to which Koch responded, "just put it on the paper." (Tr. 38, 48). Although Inendino thought to himself that "this doesn't seem right," he decided he was "not going to argue with the man. He's from the federal government. So, I'm going to do what he said to do." (Tr. 38). Inendino then marked the folded ballot on the outside with an "X," and came out and put the folded ballot into the ballot box as he was told by Koch, and left the voting area. (Tr. 38-39). When asked if he marked a check in the yes or no box, Inendino testified that "If he [Koch] would have said to me mark your X in one of the boxes, then I would have known that I should be opening this. But I didn't open it because of the way he handed it to me. He was like just go back there and put an X on this paper . . . So I did." (Tr. 38-39). Inendino further testified that this was the first time he had voted either in an NLRB-conducted election, or any election of any kind, be it local, state or federal. (Tr. 46).

Inendino testified that a few minutes after he voted, he attempted to come back to the room to use the bathroom but was told by Koch that he could not do that while the polls were open. (Tr. 39). Then, Inendino came back to the voting area a few minutes later following a conversation that he had with some of his co-workers in which he told them that it "made no sense to mark an X on the outside of the ballot," and the coworkers responded to him that "you

were supposed to open it [the ballot] up." (Id.). Inendino returned to the room, and told Koch that he had misunderstood his instructions and had marked an "X" on the outside of the folded ballot, explaining that "I asked you when I was back there what I should do with this paper and you didn't say open this up. I said so I did what you said." (Tr. 39-40, 45-46). Inendino asked if Koch could take the mismarked ballot out of the box and let him "do it the right way" but Koch said no. (Id.). Koch then asked Inendino to step out to discuss the matter with the two observers, and later he allowed Inendino to come back, and handed him a ballot "upright . . . [and] it's got all of this stuff on it." (Tr. 40). Inendino went back to the voting booth, marked his ballot "where I wanted it to go" and brought it back to Koch, who then placed it into an envelope with Inendino's name on it. (Id.).

Ouellette, a nine year Magnum employee and the Union's observer, told a somewhat different story during his testimony. (Tr. 96). According to Ouellette, when a voter came into the voting area and stated his name, Koch would then take the ballot from a pile he was holding, show the front part to the voter and explain that they should mark a yes or no on the ballot. (Tr. 97-98). Then, Koch would fold the ballot, hand it to the voter, and direct him to go to the voting booth. (Id.). Ouellette stated that Inendino came into the voting area "in a hurry" and that Koch repeated the same extended procedure with him. (Tr. 99-100). He said Inendino never asked for assistance or said anything while in the voting area. (Tr. 100). He stated that Inendino came back to the voting area twice, once to use the bathroom and another to tell Koch that he made a mistake in voting, but he could not recall which came first. (Tr. 102). He did testify that Inendino told Koch that he had made a mistake and put an X on the outside of his ballot and wanted to open the box and allow him (Inendino) to correct that. (Id.). When Koch said he couldn't do that, he allowed Inendino to cast another ballot and put it into a yellow envelope. (Tr.

102-03). Initially, Ouellette admitted (as Geraci testified) that Koch had told Inendino that his instructions to the voters may have been "vague" (Tr. 103), but then said that Koch did not say his instructions to the voters had not been clear, and professed not to know what the word "vague" even meant. (Tr. 104). When asked on cross examination whether Koch had said to Inendino that his instructions were vague, he changed his story again and denied outright that Koch had ever said that. (Tr. 107-08). He did, however, confirm that as far as he knew Inendino and Geraci were truthful people and had never lied to him to his knowledge. (Tr. 106, 108). He also confirmed Geraci's testimony that Koch told Inendino that he could not open up the ballot box, and that the told the observers they had to agree to allow Inendino to vote a second time. (Tr. 108-09). However, when asked if he saw the folded ballot with the X as Inendino described it in the pile of ballots after the ballot box was opened, Ouellette claimed that he never saw such a ballot, and did not see Koch take that ballot and put it off to the side, but did recall Koch saying one of the ballots was "void." (Tr. 112-13).

III. THE RECOMMENDATIONS OF THE HEARING OFFICER

In her Report, Hearing Officer Adriana Kelly of NLRB Subregion 30[6] dealt first with the challenge to Inendino's ballot. Although she seemed to accept Inendino's testimony in toto (and presumably thereby rejecting that of Ouellette) that he was confused when he originally came in to vote due to the Board Agent's folding of the ballot, his instructions and the failure to assist in ending that confusion, the Hearing Officer determined that Inendino's challenged ballot should

[6] As more fully discussed in the Argument section below, (see p. 18, infra), it should be noted that Ms. Kelly, the Board representative assigned to conduct the hearing was from Subregion 30 in Milwaukee Wisconsin, and not Region 13 in Chicago, Illinois. The reason for this is obvious. As the Employer's Objection No. 1 dealt with the conduct of the election by a representative of Region 13, the customary Board procedure is to have any hearing on such objections conducted by a person outside of the Region. See NLRB Case Handling Manual, ¶ 11424.2 ("The hearing officer ordinarily should be a Board agent from the Region in which the hearing is to be held, except: (a) If a hearing is directed by the Regional Director or the Board where an issue involves the conduct of a Board agent...."

not be opened and the challenge be sustained. (Hearing Off. Report, p. 3). She reasoned that the Board has long held that a voter may not withdraw their ballot following voting, citing T & G Mfg. Co., 173 NLRB 1503 (1969) and Great Eastern Color Lithographic Corp., 131 NLRB 1139 (1961). Since she believed that Inendino had the chance to correct his mistakenly marked ballot before putting it into the ballot box but did not, she concluded that he cannot be allowed essentially to vote a "second time." She further stated that to allow Inendino's challenged vote to be counted would undermine the Board's established procedures for conducting an election as well as their presumption of fairness and regularity, and further would encourage employees in future elections to discuss their ballots and create an avenue for fraud and abuse by the losing party.

The Hearing Officer then dealt with the Employer's Objection No. 1, which challenged the conduct of the election, noting that Inendino was confused as to the Board's election processes and that the Board agent should have allowed him to cast a proper ballot. In rejecting this contention, the Hearing Officer first stated that Inendino had the opportunity to obtain a clean ballot after mismarking his first ballot before leaving the polling area, and that once he cast his ballot, he loses control of it. (Hearing Off. Report, p. 4). She concluded that it would have been improper for Board agent Koch to have retrieved the ballot from the box (citing Jakel, Inc., 293 NLRB 615 (1989)), and found no misconduct in Koch's failure to accede to Inendino's request to allow that action. The Hearing Officer then stated that the Employer cannot argue the issue of Inendino's confusion being the fault of Koch as it was not specifically raised in Objection No. 1, and thus the Employer's brief cannot raise such issues as it would involve addressing a new legal theory and different factual circumstances. (Hearing Off. Report, p. 4-5). However, the Hearing Officer assumed arguendo that even if the Board Agent's instructions

were reasonably encompassed within that Objection, she nonetheless recommended overruling it in any event. Finding that Koch followed established Board procedures in running the election, the "fact that Inendino took the Board Agent's instructions too literally is Inendino's admitted own mistake and not the fault of the Board Agent." (Id., p. 5).

IV. ARGUMENT

We submit based upon the evidence and arguments presented below that the Board should reject the Hearing Officer's recommendation, and open and count the challenged ballot of employee Anthony Inendino. Contrary to her recommendations, we submit that Inendino was not trying to vote twice but only once, and his ballot should be counted just as those of his co-workers, and the cases upon which she relied to support her findings are wholly inapposite to the issue before the Board in this case. Further, and assuming that the challenge to Inendino's ballot is sustained by the Board, we then urge that the election be set aside due to all of the circumstances testified to by the witnesses at the hearing. Contrary to the Hearing Officer's recommendations, the Employer's Objection did raise the issue of Inendino being "confused" as to the Board's election procedures and the record evidence fully established the reason for his confusion, which was rooted in the conduct of the Board's Agent who ran the election. That issue was raised and fully litigated by the parties, and should have been determined by the Hearing Officer. Moreover, we submit that based on the entirety of that record evidence, the Board should find that the voter was in fact confused by the actions of the Board's Agent and for that reason, the election should be set aside.

A. The Challenged Ballot Should Be Opened and Counted

The results of the vote in this election were seven for the petitioner, six against and one challenged ballot, that of Mr. Inendino. Obviously, the issue of whether this ballot is opened and

counted is outcome determinative, whether or not it was cast for or against the Petitioner. Although the Union contended at the hearing, and the Hearing Officer so found, that the challenge to the ballot be sustained since voters are only entitled to "one vote" (reminiscent of the Supreme Court's holding in Baker v. Carr, 396 U.S. 186 (1962)), the Employer submits that under the circumstances in this case, the challenge to the ballot should be overruled and the vote counted for exactly the same reason: every voter should get one vote and that challenged ballot is Mr. Inendino's only valid vote which he attempted to cast in this election.

At the outset, it is settled Board law that a ballot which is "blank" or which has an "X" marked on the back with no other clear expression of the voter's intent, is considered "void" and is of no legal consequence. See e.g., Manhattan Corporation, 240 NLRB 272 (1979)(ballot marked with an "X" on reverse side is "void"); Q-F Wholesalers, Inc., 87 NLRB 1085 (1949)("blank" ballot is "void"). In NLRB v. Vulcan Furniture Mfg. Co., 214 F.2d 369, 372 (5th Cir.), cert. denied, 348 U.S. 873 (1954), the court, in commenting on the meaning of a "void" ballot" stated that "[a]n unmarked or otherwise non-committal ballot is not a vote...." From these cases, and cases like them, it is clear that a ballot cast by a voter which simply has an "X" on the back with no other expression of intent on it is a "void" ballot and it does not constitute a vote for anything. It is if the employee had never voted at all.

That being the case, based on the weight of the persuasive evidence in this case, when Mr. Inendino marked his ballot in a fashion which voided his ballot and quickly realized his mistake following a discussion with his co-workers, he immediately returned to the election area and brought it to the attention of the Board agent while the polls were still open. He did not, contrary to the Hearing Officer's recommendations, seek to vote twice. Rather, he sought to have one validly cast vote counted, after having discovered that the ballot he had cast was void

and without effect. It must be remembered that the election processes of the Board are designed to allow employees in the voting unit the maximum opportunity to cast their votes on the issue of union representation. And, although it would appear that marking an "X" in the "yes" or "no" boxes on the paper ballot should be a simple exercise, that this is not always the case. Persons may be nervous in casting their ballot, they may not understand the Board agent's instructions, or they may be truly confused, as this procedure is something which likely they have never done before. This is especially true in the case of Inendino who credibly testified that he had never voted before in any election, whether Board-conducted or otherwise, and was confused by the Board agent as to what he should do. Indeed, for these reasons, a voter may wind up spoiling his ballot and ask the Board agent for a new ballot after surrendering the spoiled ballot. Board procedures clearly recognize this possibility, which is why the Board's election procedures allow the Board Agent who is running the election to take custody of a spoiled ballot and to give the voter a substitute ballot so that he may cast his one valid vote. See NLRB Case Handling Manual (Part 2), Representation Proceedings, ¶11,322.3. [7] Thus, had Inendino (or any other employee) gone to Mr. Koch during the polling and indicated that he had improperly marked his ballot and wanted another, he likely would have been accommodated or the validity of the election justifiably would be called into question. The fact that Inendino placed his ballot into the ballot box before bringing his mistake to the Board agent's attention because he did not realize at that time he had voided his ballot after following the Board Agent's instructions should not require a different result, contrary to the findings of the Hearing Officer that Inendino had the chance to correct his mismarked ballot before he left the polling area, and therefore must suffer

[7] "A voter who spoils his/her ballot and returns it to the Board agent should be given a new ballot. On request, the Board agent should show the spoiled ballot to the observers, provided no voting preferences are thereby disclosed. Spoiled ballots should be preserved."

the consequences of failing to do that because of "policy considerations." (Hearing Off. Report, p. 3). Of course, how Inendino was to engage in such action without first realizing until he left the polling area that he had in fact made a mistake is something which is unanswered by the Hearing Officer. While Inendino did place his original mismarked ballot in the box instead of asking Mr. Koch for another ballot, the cases cited above make it clear that his initial ballot was "void" – i.e., as if he had never cast it in the first place. Hence, he should have been allowed to cast his ballot correctly, have it placed into a challenged ballot envelope to insure that he was telling the truth about the circumstances of mismarking his ballot, and then have that ballot counted once the opening of the ballot box revealed without question that what Inendino had told Koch about mismarking his ballot (i.e., placing an X on the outside of the folded ballot) was in fact completely true.

Allowing Inendino's vote to be counted under these circumstances is both legally and factually distinguishable from the cases cited by the Hearing Officer in her Report, which she stated set forth the Board's policy that a voter may not withdraw his ballot once he has voted. Thus, in T & G Mfg. Co., 173 NLRB 1503 (1969), the Board refused to allow an employee to withdraw an otherwise validly cast ballot once it was cast, based on the voter's affidavit submitted long after the polls closed that his ballot mistakenly was not cast for the "right party." Similarly in Great Eastern Color Lithographic Corp., 131 NLRB 1139 (1961), five persons whose names were not on the voting list but who were alleged discriminates in a pending unfair labor practice case, submitted affidavits after the polls closed asking that their previously-cast ballots be "withdrawn." In both cases, the Board refused to allow the voters to amend or withdraw their ballots, given the real possibility that undue pressure could be applied to a voter by a party to retroactively change his vote once the outcome of the balloting became known,

thereby potentially compromising the integrity of the Board's voting process.[8] In further support of her position, the Hearing Officer relied upon Monfort, Inc., 318 NLRB 209 (1995), wherein the Board refused to allow several persons to cast ballots who claimed they had not voted since their names were marked off the voting list by both observers as having voted, and for that reason there was a risk that the voters impermissibly might vote twice.

However, this case does not present a situation wherein a voter is improperly seeking to vote twice (in the legendary "Chicago style" of voting), or to change his ballot following a case of "buyer's remorse" about his choice, or in response to "pressure" from one side or another to change his vote in order to affect retroactively the outcome of the election, all of the evils which the Hearing Officer decries in her Report. As established above, legally speaking Inendino never really voted at all, and he is certainly should be entitled as a member of the voting unit to cast one valid ballot. He realized his mistake, came back to the voting area, and explained to Mr. Koch the fact that he was confused and had voided his ballot, and wanted the right to cast his one and only valid vote. He should have been accommodated in this regard, once it was clear during the count that there was a void ballot in the box marked just as Inendino had stated had happened, and that he was not trying to improperly cast two votes. Unlike the cases cited by the Hearing Officer, Inendino was not seeking to withdraw an already validly cast ballot – he simply was trying to correct a mistake that he had understandably made (and which many voters sometimes make, even in elections for federal office, which explains the existence of the right in such elections of a voter to cast a "provisional ballot" under a number of legally-specified

[8] But see Alpers Jobbing Co. v. NLRB, 547 F.2d 402 (8th Cir. 1976), cert. denied, 434 U.S. 877 (1977), in which an employee had "mistakenly" voted for the union and later attempted to change that ballot, claiming that he was openly anti-union and was confused when he cast his ballot following a confrontation in the voting area with the union's observer. The court in that case refused to enforce the Board's order which had not allowed the employee to present evidence on the issue of his confusion in voting, in light of the totality of the circumstances.

circumstances). Allowing a voter to correct a void spoiled ballot, and to have the right to exercise his right to vote properly while the polls are still open, does not present the parade of horribles raised in the Hearing Officer's Report, and that ability should be recognized under the unique facts of this case, especially since the root cause of the voter's confusion was the way the Board Agent tendered a pre-folded ballot and admittedly gave "vague" instructions to the voter. Lastly, the Hearing Officer's concern (Hearing Off. Report, p. 3) that counting Inendino's ballot would destroy the secrecy of the balloting process by revealing who he voted for proves too much, since under this reasoning the Board would be required to overrule a challenge to a ballot in every case where there is only one challenged ballot and it is outcome determinative, and that simply is not an accurate statement of applicable Board law. Nor is it consistent with the one of the most fundamental purposes of the Act which is to allow for free choice concerning union representation by all members of the proposed bargaining unit.

Fundamental fairness to Mr. Inendino requires that he be given a legal say in whether he wishes union representation or not, and that he not be disenfranchised because of an error which he attempted to correct almost immediately upon realizing. Therefore, for all of these reasons, we urge that the challenge to this ballot be overruled, and that Mr. Inendino's vote be counted.

B. Alternatively, Employer's Objection No. 1 Should Be Sustained And The Election Should Be Set Aside Due to the Conduct of the Election

1. The Allegations Raised by the Employer in Objection No. 1 Are Sufficiently Related to Objection No. 1 and Were Fully Litigated by the Parties at the Hearing.

In the event that the challenged ballot is not opened and counted, then the Employer urges that the election should be set aside due to the conduct of the election. We submit that, based on the weight of the evidence presented at the hearing and for the reasons set forth below,

the confusion of the voter was caused in part by the Board Agent, and consequently the election should be set aside for that reason.

First, the Hearing Officer's initial recommendation that she could not consider the merits of the arguments raised by the Employer at the hearing and in its post hearing brief since it was a different legal theory than that raised in the Objection, is simply wrong as a matter of law and fact. The Objection states that Inendino was "confused" as to the Board's election procedures and mistakenly cast a spoiled ballot for that reason. (Objection No. 1, Ex. 1 to the Regional Director's Report). Further, at the hearing, counsel for the Employer in the opening remarks argued that if Inendino's ballot is not opened, then the election should be set aside due to "conduct engaged in by the Regional Director's representative." (Tr. 8). Thereafter, during the course of the hearing, both parties presented evidence not only that Inendino had mistakenly marked his ballot, but witnesses who testified concerning the manner of the Board Agent's conduct of the voting procedures and the reasons why Inendino erroneously marked his ballot in the way that he did. Finally, those facts were put into legal context in the employer's post hearing brief which demonstrated why those facts presented an appropriate reason for setting aside the election due to the circumstances as to how it was run by the Board's Agent.

The Board has long held that objections to a Board-conducted election are not like pleadings in a court room. Rather, they are intended to raise issues which the Regional Director either may decide based on his or her administrative investigation, or send to a hearing where disputed factual issues may be resolved more thoroughly. If a party has notice of the issues that are encompassed in an Objection and has a full and fair opportunity to litigate those issues in a hearing, then the matter is properly before the Board for adjudication. Indeed, the Board has long held that it will consider the merits of a party's allegations of objectionable conduct "that do

not exactly coincide with the precise wording of objectionable conduct . . . [where] they are sufficiently related to [the] objections to warrant our consideration of the merits." Fiber Industries, Inc., 267 NLRB 840, fn. 2 (1983). See also Best Western Executive Inn, 272 NLRB 1315 fn. 1 (1984), to the same effect. For example, in NLRB v. Leslie Metal Arts Company, Inc., 530 F.2d 720 (6th Cir. 1976), the court affirmed the Board's bargaining order issued against the employer and, in so doing, specifically rejected the employer's argument that a particular company speech which was found to have interfered with the election was not properly encompassed in the Union's objections, stating as follows:

> While the objections of the Union to the first election did not indicate specifically that the Tassell speech would be relied upon, it appears that evidence with respect to the nature of the speech was introduced by the Union, without objection, at the hearing, and that witnesses were examined and cross-examined on the subject. Nevertheless, the Company not only made no objection at the time, but it also made no effort to obtain a delay or continuance until it could prepare to refute the evidence concerning the speech.
>
> In addition, the Union's letter to the Company of November 12, 1973, was sufficient to notify the Company of the general nature and character of the objections upon which the Union relied to claim invalidity of the election. Under the circumstances, we hold that the Company was not prejudiced or taken by surprise.

(530 F.2d at 721-22).

Further, the Board policy towards objections is such that even where no objection to specific conduct is raised, the Regional Director still may set aside an election based on conduct uncovered during the investigation of other objections. In White Plains Lincoln Mercury, Inc., 288 NLRB 1133, 1136 (1988) the Board stated the rationale behind this rule as follows: "once the Board's investigative processes are set in motion by timely filed objections and the Regional Director discovers, during the course of the investigation, evidence that the election has in some manner been tainted, he may properly rely on that to set aside the election. This is so whether the

objectionable misconduct was alleged in the party's objection or was uncovered independently by the Region during its investigation of the disputed election." See also Clark Manor Nursing Home Corp., 254 NLRB 455 (1981); Seneca Foods Corp., 244 NLRB 558 (1979); American Safety Equipment Corp., 234 NLRB 501 (1978).

The cases cited by the Hearing Officer in support of her finding that the Employer's Objection No. 1 did not sufficiently raise the issues surrounding the source of employee Inendino's confusion, arise in circumstances wholly distinguishable from those in the case at bar. Thus, in Iowa Lamb Corp., 275 NLRB 185 (1985), the Board ruled that an employer's remarks about seeking improved insurance coverage the day before the election could not form the basis for setting aside an election as the matter was not raised in any objection, it was not mentioned in the Regional Director's order directing a hearing, the hearing officer did not inform the parties that he would be considering the issue at the hearing, and the matter was not litigated at the hearing by the parties. Similarly, in Precision Products Group, Inc., 319 NLRB 640 (1995), the union had raised a specific objection concerning "bargaining from scratch" campaign statements made by the employer's representative, but withdrew that objection prior to the direction of the hearing, and it was not the subject of the Regional Director's notice of hearing. For that reason, and because the employer had no notice that the specific matter would be at issue at the hearing, the Board ruled that the speech could not form the basis for the hearing officer setting aside the election. In both of those cases, the reason that the Board refuses to allow a party to rely on conduct either not raised in an objection or which is not sufficiently related to an objection, is that the parties have no notice as to what the hearing issues may entail and are precluded from introducing evidence concerning those issues. Where, however, a matter is sufficiently related to a timely-filed objection, a party is able to present evidence and to argue

the legal merits of that evidence even if the objection does not precisely mention the exact issue to be raised at the hearing.

In the instant case, there can be no serious question as to whether that Objection No. 1 raises the issue of the "confusion" of employee Inendino in casting his ballot, and that the employer was placing the responsibility for that matter at the feet of the Board's Agent at the election. The matter was the subject of position statements to the Regional Director, who after receiving those statements, directed that a hearing be held on that Objection along with several others. Indeed, the fact that the Regional Director selected a hearing officer from outside of Region 13, thereby following the preferred course of action set forth in the Board's Case Handling Manual (see supra at p. 8, fn. 6), strongly supports the conclusion that at the time the Regional Director directed the hearing on Objection No. 1, he certainly was aware that Objection No. 1 encompassed the Employer's contentions that it was asserting the Board Agent at the election was partially responsible for Inendino's confusion and mistakenly spoiling his ballot. Further, and as noted above, at the hearing counsel for the Employer indicated that he expected the evidence which he would produce during the hearing to show that the Board election representative's election day conduct warranted a finding that the election should be set aside. Finally, all of the evidence relied upon by the Employer in its post hearing brief to the Hearing Officer was produced by both parties at the hearing, who by their questioning of the witnesses clearly revealed that they understood the full nature of the issues being raised by the Employer in Objection No.1, and had a full and fair opportunity to present and cross examine all of that testimony and to make their positions known in the record. Thus, based on the entire record before the Hearing Officer and the Board, it is clear that all matters even marginally related to

Objection No. 1 were fully litigated at the hearing, and are now properly before the Board for resolution.

For all of these reasons, we submit that the Hearing Officer's conclusion that the arguments raised by the Employer are not encompassed in Objection No. 1 should be rejected outright by the Board. Rather, the Board should deal with these arguments on their merits, based on the arguments set forth below.

2. The Election Should Be Set Aside Due to the Conduct of the Board Agent.

Having established that the Employer's arguments concerning Objection No. 1 are properly before the Board for resolution, we further urge the Board to set aside the election due to the confusion of employee Inendino which was caused in large part by the manner in which the Board's Agent conducted the election. We submit that the manner in which the ballots were presented to the voters, coupled with the instruction that were given by the Board Agent, were sufficient to cause confusion in a person who had never voted before, which confusion was the direct and sole cause of the voter mismarking his ballot. Further, this conduct was compounded by the Board Agent's failure to render assistance to a voter who asked for and did not receive it in any meaningful way. Lastly, the voter's suggestion that the spoiled ballot be retrieved, although admittedly unusual in Board elections, has been done on occasion and it should have been allowed under the unique circumstances of this case.

In Sewell Mfg. Co., 138 NLRB 66, 70 (1962), the Board held that its function in representation cases "is to conduct elections in which employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice." "The

Board's election process is rightly called the 'crown jewel' of the Board's endeavors. The election is the place where the ultimate Section 7 choice is made and the Board goes to extraordinary lengths to see to it that the election is conducted in a fair and impartial manner." Sonoma Health Care Centers, 342 NLRB 933, 936-37 (2004)(Chairman Battista, dissenting). See also, Athbro Precision Engineering Corp., 166 NLRB 966 (1967). For these reasons, the integrity of the Board's election processes must be protected, especially where the conduct of the election by the Board's agents may be called into question. As the Board stated in Alcon Iron & Metal Co., 269 NLRB 590, 591 (1984): "There is well-established precedent that the Board in conducting elections must maintain and protect the integrity and neutrality of its processes. See, e.g., Glacier Packing Co., 210 NLRB 571 (1974); Kerona Plastics, 196 NLRB 1120 (1972). Election conditions must approach, as nearly as possible, ideal 'laboratory conditions so as to facilitate expression of the uninhibited desires of the employees. General Shoe Corp., 77 NLRB 124, 127 (1948). Thus, the commission of an act by a Board agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is sufficient basis for setting aside that election. Glacier Packing, supra." Where the integrity of the voting process is challenged, and there is reasonable doubt as to the fairness and validity of the election, it should be set aside. Sawyer Lumber Co., 326 NLRB 1331 (1998).

Thus, the Board has set aside elections in which the actions of the Board agent conducting the election – however inadvertent or unintentional -- may have compromised this high standard. Thus, in Renco Electronics, 330 NLRB 368 (1999), the election was set aside where the Board's election interpreter may have given misleading information to voters not proficient in English which led them to believe the Board wanted them to vote "yes." Similarly,

in Kraft, Inc., 273 NLRB 1484 (1985), where the Board's multi-lingual ballot was confusing in nature to a number of voters, the Board set the election aside. Likewise, in Alcon Iron & Metal Co., supra, the election was set aside where it appeared that the Board agent had simply delegated to the union's observer the explanation of the election processes to certain non-English speaking voters. The rationale of these holdings are not limited to situations where a voter may not be proficient in English, but extend also where a voter may be confused as to the mechanics of the election process by a Board agent's statements that may have been erroneous or misleading. See, e.g., Harry Lunstead Designs, Inc., 270 NLRB 1163 (1987)(setting aside election where the Board agent misspoke concerning the observer's ability to use a challenge voter list as well as the challenged ballot process itself). As Board Member Hunter once stated: "The Board . . . must set aside any election where it has failed to assure the employees a meaningful opportunity to exercise their choice by the Board's failure to ensure that clear directions are communicated to the employees." Alcon Iron & Metal Co., supra at 592 (Member Hunter concurring).

Contrary to the findings of the Hearing Officer, we believe that after consideration of all of the facts, this case clearly presents a situation where the voter in question was confused by the instructions given by the Board's Agent and the manner in which he conducted the election. According to both Geraci and Inendino, when Inendino came into the voting area initially to cast his ballot, Mr. Koch, the Board attorney in charge of the election, handed Inendino a ballot which he previously had folded into "quarters" (thereby concealing the face of the "voting portion" of the ballot) and told Inendino to go into the booth and mark an "X" on the ballot. According to Inendino, since he had never voted in a Board election before and was confused by that instruction, he decided to do exactly and literally what he thought Koch told him to do – he

marked the folded ballot with an "X" on the outside without opening it, and only learned after he left the voting area that he had made a mistake. Further, while he was voting, Inendino testified that he had asked Koch for assistance, specifically asking where he was to mark the ballot after he had entered the voting booth and saw the folded blank piece of paper with no "yes or no category on it," and Koch simply responded "just put it on the paper." (Tr. 38, 48). While at first blush it may seem, as the Hearing Officer commented (Hearing Off. Report, p. 5), that Inendino may have taken Koch's instructions a bit too literally, it must be remembered that Inendino had never voted before in any election, was likely nervous for that reason, and as Inendino candidly explained, he was "not going to argue with the man. He's from the federal government." (Tr. 38). Indeed, according to Geraci, after Inendino explained his problems, even Koch conceded to the observers in the voting area that his instructions might have been a little "vague."

Although it is unclear if the Hearing Officer in her Report paid any attention to Ouellette's testimony that Koch had opened the ballot and fully explained how to vote to Inendino, and that Inendino never had indicated any confusion to Koch, his testimony in that regard should not be credited in any event. First, Ouellette was nervous and evasive during his testimony and changed it in certain crucial respects (i.e., his testimony about whether or not Koch said his instructions were vague, first saying Koch did say that, then saying he didn't, and then professing not to know what the word "vague" even meant). (Tr. 103-04, 107-08). More importantly, given the uncontested fact that Inendino came back and complained to Koch about being confused by his instructions, (something which Geraci, Inendino and Ouelette all agreed had occurred), and the simple fact that Inendino marked an "X" on the outside of the ballot and came back immediately to correct that once he learned that he had made a mistake, tends to

corroborate Geraci's and Inendino's version of the events that Koch did not fully explain the mechanics of the ballot to the voters but simply stated, as Inendino and Geraci both testified, that the voter should take the folded ballot, go back to the voting booth, and mark an "X" on it. Given Ouellette's concession that he has not known Geraci or Inendino to lie to him before, and given Geraci's complete lack of any demonstrated motivation to lie about the events in his testimony, we submit that Geraci's and Inendino's version of the events should be credited, as they are more consistent with the events that occurred and they testified in a direct, credible and fully believable fashion. Indeed, although she did not specifically make any specific findings in this respect, the Hearing Officer seemed to have accepted Inendino's testimony as accurate and the Board should do likewise.

Although we are reasonably certain that Mr. Koch did not intend that the voter should take him literally about how to mark his ballot, the simple fact is that you take your voter – much the way you take a plaintiff in tort litigation – in the proverbial "way you find him" and not as you would like him to be. Given the mechanics of how Koch handed a voter a folded ballot -- something which is not necessary or even required under the Board's election procedures -- and then gave instructions about marking an "X" on that ballot after handing the voter a folded ballot which conceivably could have been (and in fact were) misunderstood by an uninformed and unsophisticated employee, Inendino's confusion is understandable and was the product of the manner that the Board Agent handled the ballots and instructed the voters. Even Koch conceded to Geraci that his instructions may have been "vague." Moreover, Koch could have ended Inendino's confusion by responding to Inendino's request for help by asking him what is was he didn't understand about the ballot, instead of simply telling him to mark an X on the ballot. At that point, Koch might have learned that Inendino hadn't opened up the folded ballot and that

was why he was confused about Koch's instructions to simply mark an X on the ballot. The Hearing Officer's statement (Hearing Off. Report, p. 5) that Inendino's confusion could have been corrected by his review of the Board's election notice, would hold water if Inendino had received a ballot open face which looked like the ballot depicted on the Board's notice, but he didn't: he got one that was folded up, along with instructions simply to make an X on it. And after failing to get any real guidance from the Board Agent to resolve his confusion, Inendino decided to do as he was told since he did not want to argue with a government agent. Based on all of these reasons, if the choice in this case is either on the one hand to allow this unfortunate situation to disenfranchise a voter (as the Hearing Officer believes should occur), or on the other to correct a misunderstanding caused in part by the Board's own Agent and let a member of the proposed bargaining unit have a say in a crucial decision about whether he wants union representation, it would seem that the integrity of the Board's election processes, as well as simple notions of fairness, demand that the election be set aside and re-run in the event that the challenged ballot is not counted.

Finally, apart from these issues, once Inendino had explained to Koch the circumstances of the confusion when he returned to the voting area, Koch could have taken the admittedly unusual step of opening the ballot box and retrieving the folded ballot with the "X" on the outside, just as Inendino had asked him to do. Although the Hearing Officer opined (Hearing Off. Report p. 4) that the Board does not allow such invasions of the ballot box, citing Jakel, Inc., 293 NLRB 615 (1989), that is not correct. As the Employer noted in its post-hearing brief, in K. Van Bourgondien & Sons, Inc., 294 NLRB 268 (1989), a case that distinguishes Jakel, Inc., supra, the Board decried the adoption of the per se rule regarding ballot retrieval referenced by the Hearing Officer, and concluded that in that case that it was not objectionable conduct for the

Board Agent to open up a ballot box during the election in order to retrieve a ballot which was supposed to be challenged but which was erroneously placed into the box by the voter who was being challenged. Unlike this case, where Inendino was asking to retrieve a void ballot which had no vote marked for anyone, in K. Van Bourgondien the voter clearly had marked her ballot and it was "fished out" of the box by the Board Agent based on the voter's own statement that she recognized the ballot since she had folded the corner of it. It would seem a fortiori that in the instant case, pulling out a void ballot from the ballot box is much less objectionable to the Board's processes and should have been allowed here.

V. CONCLUSION

For all of the reasons set forth above, the Employer submits that the challenge to the ballot of Mr. Inendino should be overruled and his vote opened and counted, or alternatively that the election should be set aside either for the manner of the conduct of the election.

Respectfully submitted,

MAGNUM TRANSPORTATION INC.

/s/ Michael W. Duffee

By: _____
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Dated: February 20, 2014

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he served the foregoing **BRIEF OF THE EMPLOYER IN SUPPORT OF ITS EXCEPTIONS TO THE HEARING OFFICER'S REPORT ON CHALLENGE AND OBJECTIONS** this 20th day of February, 2014, via the Board's electronic filing system and by e-mail to the following person(s):

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